[Cite as *State ex rel Grossenbacher v. Indus. Comm.*, 2010-Ohio-4265.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Eugene Grossenbacher,	:	
Relator,	:	
v.	:	No. 09AP-779
The Industrial Commission of Ohio and Wooster Manufacturing, Regal Ware, Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on September 9, 2010

M. Blake Stone, L.P.A., Inc., *M. Blake Stone*, and *Storck Law Office, Ltd.*, and *Jason M. Storck*, for relator.

Richard Cordray, Attorney General, and *Derrick L. Knapp*, for respondent Industrial Commission of Ohio.

Coolidge Wall Co., L.P.A., David C. Korte, Michelle D. Bach and *Joshua R. Lounsbury*, for respondent Wooster Manufacturing, Regal Ware, Inc.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

BROWN, J.

{¶1} Relator, Eugene Grossenbacher ("claimant"), has filed this original action requesting that this court issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its orders finding that he was engaged in sustained remunerative employment while receiving permanent total disability ("PTD") compensation and Disabled Workers' Relief Fund ("DWRF") benefits, declaring an overpayment, and ordering that the overpayment be collected under the fraud provisions of R.C. 4123.511(K). Claimant further requests this court issue a writ ordering the commission to reinstate his PTD compensation and DWRF benefits.

{¶2} This matter was referred to a court-appointed magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, including findings of fact and conclusions of law which is appended to this decision, and recommended that this court deny claimant's request for a writ of mandamus. Claimant has filed objections to the magistrate's decision.

{¶3} Claimant first argues that the magistrate failed to address whether the "pittance" he received in exchange for driving members of the Amish community should be deemed "remuneration," so as to fit within the purview of sustained remunerative employment. However, "[t]he issue is whether the claimant was involved in business activities for a financial or remunerative gain, not whether the claimant actually realized any gain or whether the gain was substantial." *State ex rel. Meade v. Indus. Comm.*, 10th Dist. No. 04AP-1184, 2005-Ohio-6206, ¶22, citing *State ex rel. Gyarmati v. George E. Fern Co.*, 10th Dist. No. 01AP-1357, 2002-Ohio-4323, and *State ex rel. Greathouse v. Indus. Comm.* (Dec. 7, 1993), 10th Dist. No. 92AP-1390. Furthermore, the Supreme Court of Ohio has defined the concept of remuneration as one involving direct exchange of labor for pay. See *State ex rel. Am. Std., Inc. v. Boehler*, 99 Ohio St.3d 39, 2003-Ohio-

2457. Thus, whether the payments claimant received here were a "pittance" is not the relevant issue. What is relevant is that claimant was clearly involved in a direct exchange of labor for pay.

{¶4} Nevertheless, our review of the record supports a finding that claimant received sums of money that were not insignificant. Claimant most recently charged $1 per mile to drive members of the Amish community. He drove one to two times per week, and occasionally would drive up to four times per week. Although claimant said he drives the members of the community about 10 to 15 miles per trip, one member of the community indicated claimant drove him and his employees 60-100 miles per day, another indicated he paid him $62 per day, and one indicated that claimant seemed to stay busy driving for the various furniture shops. One member alone, William Shetler, stated that claimant drove for him once or twice per week for the previous five or six years, resulting in $1,806 in payments. Another member, Daniel Miller, indicated that over the prior two to three years, claimant drove for him about every other month, earning $100 per day. This evidence supports a finding that claimant received "remuneration."

{¶5} Claimant next argues that the magistrate erred when distinguishing *State ex rel. Lawson v. Mondie Forge*, 104 Ohio St.3d 39, 2004-Ohio-6086, from the present case. Claimant asserts that the magistrate's finding that the claimant in *Lawson* only received $200 per year as a council member was incorrect. Claimant indicates that the claimant in *Lawson* also received a bonus of $6 per hour for plowing. Thus, claimant argues, the magistrate's distinction that "every time relator got in the car to drive a member of the Amish community, he was paid for those services" is invalid because both he and the claimant in *Lawson* were paid for driving. However, we find the magistrate's distinction was valid. The magistrate discussed *Lawson* to demonstrate claimant's activity

constituted sustained activity. The claimant in *Lawson* only plowed three times in seven years; thus, he was paid only three times over that seven-year period. As the magistrate pointed out, unlike the claimant in *Lawson*, claimant in the present case was paid every time he drove his vehicle for one of the Amish community members. Therefore, we agree with the magistrate that claimant's frequent driving demonstrated an ongoing pattern of activity for pay, unlike the claimant's extremely infrequent driving for pay over the span of seven years in *Lawson*.

{¶6} Claimant next argues that the magistrate erred when she stated that claimant had indicated he made a profit after paying for repairs and insurance. Initially, we note that "the absence of a profit from the business venture is not necessarily determinative" of the remuneration issue. *Meade* at ¶22. Notwithstanding, our review of the transcript supports the inference that claimant made a profit. Although claimant's answers to questions were often vague and elusive, the overall essence of his testimony was that he earned a profit. In one exchange, when counsel for the employer asked claimant whether charging $1 per mile was more than what he pays for gas, he responded, "Not really." However, when counsel pointed out that this was what commercial truck drivers charge and then asked him again whether he was earning income from driving, claimant responded, "Well, I guess if you want to say it that way. But, like I said, I put a lot to repairs, too." We also note that claimant's counsel seemingly conceded the point when he summarized claimant's testimony by stating to the hearing officer, "I think a fair reading of the statement is that they got a gross income, and they did pay for truck repairs and gas. And there apparently was some overage which would be profit and work for pay." Given the evidence in the record, we find the magistrate's conclusion that claimant made a profit was a reasonable interpretation of the evidence.

{¶7} With regard to the fraud finding, claimant argues that, in the September 20, 2006 order, the hearing officer cited only the statements of claimant to find fraud. Contrary to claimant's assertion, the hearing officer also found that claimant failed to inform the Bureau of Workers' Compensation ("BWC") of his employment when he completed the annual questionnaire, which supported the elements of representation, intent, and justifiable reliance. Furthermore, by inference, the hearing officer was relying upon the previous findings with regard to PTD overpayment to establish that the statements made by claimant with regard to his work activities were false with the intent to mislead. In addition, although claimant also argues that the hearing officer failed to enumerate one element of fraud in the September 20, 2006 order, claimant does not further specify to which element he refers, and our review of the order fails to reveal any element absent from the discussion. Therefore, this objection is without merit.

{¶8} Claimant next argues that the commission erred when it cited evidence in finding fraud in the February 21, 2008 order when no evidence was taken at the February 2008 hearing. Specifically, the hearing officer relied upon several warrants signed by claimant that contained language regarding the prohibition of working and collecting PTD, as well as several annual PTD disability letters in which claimant failed to indicate he was working. However, claimant presents no authority to support his claim that the hearing officer could not rely upon evidence already contained in the commission record, and we find no error. Thus, this objection is without merit.

{¶9} Claimant also argues that the magistrate's decision conflicts with this court's decision in *State ex rel. Goodwin v. Indus. Comm.*, 10th Dist. No. 08AP-90, 2008-Ohio-5971. However, the circumstances in *Goodwin* differ remarkably from those in the present case. In *Goodwin*, the claimant received TTD compensation for approximately 18

months. Just after the commencement date of the period of TTD, claimant attempted to work for 33 hours for approximately one week and was paid $249.38, but he was unable to continue because of his conditions. The commission vacated all TTD received during the entire period of TTD, declaring an overpayment and finding fraud. This court reversed the fraud finding, concluding that the commission's request for repayment of approximately $17,000 in TTD compensation based upon receipt of a single payment of less than $250 for approximately one week of work seemed enormously disproportionate and unfair. Id. at ¶9. The Supreme Court of Ohio agreed, finding the case did not involve massive fraud, and the claimant worked a total of 33 hours for "minimal" remuneration and then stopped working because his allowed conditions prevented him from doing the job. *State ex rel. Goodwin v. Indus. Comm.,* 124 Ohio St.3d 334, 2010-Ohio-166, ¶21. However, in the present case, claimant worked for the entire nine-year span of PTD payments, often one to three times per week. The present case also does not involve a single payment for work over a short period, but many payments for work over a very long period. Claimant here also never stopped working due to his allowed conditions, as did the claimant in *Goodwin*. The present case involves long-term, ongoing work and is inapposite to the facts in *Goodwin*. Therefore, this argument is without merit.

{¶10} Claimant argues in his next objection that the magistrate failed to address his argument that the BWC waived DWRF recoupment. Although the magistrate did fail to address this argument, we find it is without merit. Claimant asserts that, at the September 23, 2008 hearing, the attorney for the BWC specifically stated that he had waived any overpayment of DWRF benefits; yet the commission ordered an overpayment. Claimant refers to the following statement made by the BWC attorney at the hearing: "My recollection serves me that this is here not by a Bureau referral. In fact,

this matter was raised at a prior hearing, which isn't reflected in any of the orders, where I waived any DWRF overpayment." However, it is unclear to what precisely the BWC representative was referring. The record contains no other references to any waiver of the DWRF issue. The BWC filed a motion requesting recoupment of DWRF payments, and there exist no orders indicating that DWRF recoupment was ever waived. After making the above statement, the BWC attorney then immediately began addressing the merits of fraud as it related to the DWRF payments. Given the state of the record before us, we cannot find that it was error for the hearing officer to address fraud related to DWRF. Therefore, this objection is without merit.

{¶11} After an examination of the magistrate's decision, an independent review of the evidence, pursuant to Civ.R. 53, and due consideration of the claimant's objections, we overrule the objections. Accordingly, we adopt the magistrate's decision as our own with regard to the findings of fact and conclusions of law, and we deny claimant's request for a writ of mandamus.

Objections overruled; writ of mandamus denied.

FRENCH and DELANEY, JJ., concur.

DELANEY, J., of the Fifth Appellate District, sitting by assignment in the Tenth Appellate District.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Eugene Grossenbacher,	:	
Relator,	:	
v.	:	No. 09AP-779
The Industrial Commission of Ohio and Wooster Manufacturing, Regal Ware, Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	

M A G I S T R A T E ' S D E C I S I O N

Rendered on May 10, 2010

M. Blake Stone, L.P.A., Inc., and *M. Blake Stone*, for relator.

Richard Cordray, Attorney General, and *Derrick L. Knapp*, for respondent Industrial Commission of Ohio.

Coolidge Wall Co., L.P.A., David C. Korte, Michelle D. Bach and *Joshua R. Lounsbury*, for respondent Wooster Manufacturing, Regal Ware, Inc.

IN MANDAMUS

{¶12} Relator, Eugene Grossenbacher, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of

Ohio ("commission") to vacate its orders finding that he was engaged in sustained remunerative employment while receiving permanent total disability ("PTD") compensation and Disabled Workers' Relief Fund ("DWRF") benefits, declaring an overpayment, and ordering that the overpayment be collected under the fraud provisions of R.C. 4123.511(K). Relator further requests this court issue a writ ordering the commission to reinstate his PTD compensation and DWRF benefits.

Findings of Fact:

{¶13} 1. Relator sustained four work-related injuries during the course of his employment. Three of these injuries were sustained while relator was working for self-insured respondent Regal Ware, Inc. ("Regal Ware"), and his claims have been allowed for the following: Claim No. L869753-22: "right knee, contusion right knee with probable strain of medial collateral ligament, possible internal derangement of right knee." Claim No. L11227-22: "hernia, lower abdomen." Claim No. L68211-22: "sprain lower back, thoracic muscle strain." Relator also has one claim with a state-fund employer; specifically, claim No. 84-13374 allowed for "anterior inferior dislocation right shoulder."

{¶14} 2. In 1997, relator was awarded PTD compensation after the commission found that relator's nondisability factors did not favor re-employability. The commission allocated 90 percent of the award to the self-insured claims.

{¶15} 3. In 2006, Regal Ware filed a motion requesting that relator's PTD compensation be terminated on grounds that relator was engaged in sustained remunerative employment. Regal Ware also requested a finding of fraud.

{¶16} 4. Relator does not challenge any of the evidence Regal Ware submitted in support of its motion. Regal Ware's evidence consisted of an investigation report from

Greater Cincinnati Investigation which contained affidavits from several members of the Amish community attesting to the fact that relator had been driving them various places for pay since 1996. Further, there were statements indicating that relator hauled various items for members of the Amish community for pay. Relator charged as much as $1 per mile. In addition, at the hearing before the staff hearing officer ("SHO"), relator admitted that he drove members of the Amish community three and sometimes four times a week.

{¶17} 5. Because the compensation involved had been awarded for more than one purpose (PTD and DWRF[1]) and because only three of the claims involved the self-insured employer, Regal Ware, while the other claim was a state fraud case, more than one hearing before an SHO occurred. The first hearing involving the self-insured claims was held September 20, 2006. Because DWRF benefits are paid by the Ohio Bureau of Workers' Compensation ("BWC") and not by the self-insured employer, the issues of overpayment and fraud related to those benefits was not addressed. Regarding the evidence submitted, the SHO determined:

> At this hearing the Employer clarified its position to request permanent total disability benefits be terminated because the Injured Worker is engaged in sustained remunerative employment. The Employer also requests a finding of fraud be made.
>
> In support of its position, the Employer principally relies on the affidavits that it received from seven members of the Amish community. The affidavits attest to the fact that the injured worker acted as a driver for Amish citizen[s] on numerous occasions, and he received compensation for his services. The affidavits cover work performed from 1996 to 2006. The Employer also has videotaped evidence of the Injured Worker's activities; however, the employer is not asserting that the activities observed constitute evidence of work or the

[1] DWRF provides additional compensation to claimants receiving PTD compensation when the amount of PTD compensation received is below a certain level and is designed to raise the claimant's compensation to a minimum amount. Relator began receiving DWRF benefits in 2002.

> ability to engage in sustained remunerative employment.
>
> In support of its request for a finding of fraud the Employer offers the yearly questionnaires that the Injured Worker completed wherein he falsely stated that he was not working in the year prior to the receipt of the questionnaire.
>
> The Injured Worker admits that he drove members of the Amish Community for pay. It is the Injured Worker's position that the activities were not done on a sustained basis; therefore, despite the fact that he received payment for his services he remains entitled to permanent total disability.

{¶18} 6. A hearing in the state-fund claim was heard on September 5, 2007. The SHO referenced relator's prior testimony and more thoroughly identified the evidence presented:

> The evidence reflects the self-insured employer hired a private investigation firm to conduct surveillance of and investigate the injured worker. Multiple reports have been presented from General Corporate Investigation, Inc./ Greater Cincinnati Investigation Inc. (GCI). These reports chronicle the injured worker's activities from 12/17/01 to 5/31/02, 6/23/04 to 9/16/04, and 10/10/05 to 11/7/05. The surveillance of the injured worker during these periods led GCI to several individuals who have submitted affidavits confirming that they hired the injured worker from 1996, prior to the start date of permanent total disability benefits in this claim, to 2006 to transport members of the Amish community, furniture, and other materials.
>
> The affidavit of David Troyer dated 2/7/06 indicates he hired the injured worker to haul items from 1996 to 1999 for approximately 4-6 hours per week. The injured worker was paid at an unspecified rate for these services. Mr. Troyer has employed the injured worker "very little" since 1999.
>
> The affidavit of Melinda Miller dated 2/7/06 indicates she lives directly across the street from the injured worker and has employed him over the years to haul fruits and vegetables or to go to a gas station for gas for tractors. Ms. Miller indicates the injured worker "is known to deliver furniture for some of the local furniture shops." Ms. Miller estimated that while the injured worker does not seem to work on a daily basis, he does "stay busy working for the various furniture shops."

> The affidavit of William Shetler dated 2/8/06 indicates he had hired the injured worker for the preceding 5 or 6 years "as a driver on the average of once or twice [a] week." The injured worker drove Mr. Shetler's employees to various work sites, drove Mr. Shetler to sites to perform estimates, did light hauling of construction materials, and occasionally helped to load and unload materials. Mr. Shetler paid the injured worker approximately $.70 per mile.
>
> The injured worker did not dispute the information contained in these affidavits, or the other four affidavits, and testified that this information was accurate. The injured worker admitted to driving the Amish for fees on the average one to two times per week during the period from 1996 to 2006. * * * The injured worker further testified that the seven individuals from whom affidavits were obtained were not the only people for whom the injured worker had worked. * * * The injured worker testified that on occasion he worked three or four days per week. * * *
>
> Also, it was not disputed that the injured worker's services were provided for a fee. The affidavits reflect the injured worker charged a flat rate for certain activities and over the years his rate per mile has spanned $.50 to $1.00.

(Emphasis sic.) The SHO found that relator had been overpaid.

{¶19} 7. At both hearings, relator made the same argument: his activities were not inconsistent with his receipt of PTD compensation because his activities were not done on a consistent basis and, as such, were not "sustained." Relator cited *State ex rel. Lawson v. Mondie Forge*, 104 Ohio St.3d 39, 2004-Ohio-6086, in support. At the September 20, 2006 hearing, the SHO rejected this argument as follows:

> The Staff Hearing Officer finds that the facts in Lawson are distinguishable from the facts in this case. Lawson dealt with an injured Worker who had been determined to be permanently and totally disabled as a result of both psychological and physical conditions. The allowed conditions limited Mr. Lawson to sedentary low stress work activities. After long term surveillance the Bureau of Workers' Compensation gathered evidence depicting Lawson plowing snow, putting out flags, and doing some lifting. Based on this

evidence, the Bureau of Workers' Compensation attempted to establish that Mr. Lawson had engaged in physical activities inconsistent with his permanent total disability status. According to the facts presented in Lawson the Court felt that the issue to be decided was "How active a person can be and still be deemed eligible for permanent total disability" at 41.

The Court's decision was favorable to Mr. Lawson because the evidence in review did not show a consistent pattern of physical activity that was outside the scope of the Injured Worker's physical restrictions; therefore, the Court found that the evidence did not show the Injured Worker was capable of engaging in sustained remunerative employment.

The facts in this case present a different issue than was presented in Lawson. Here the ultimate issue is whether the Injured Worker was engaged in sustained remunerative employment. No one is asserting that the Injured Worker has the capacity to engage in his former position of employment or that he engaged in activities that were inconsistent with his alleged disability. Although the Employer's motion initially sought termination on the grounds that the Injured Worker's physical activities were inconsistent with the receipt of permanent total disability, the Employer has since clarified its motion to seek termination of benefits because the Injured Worker was working.

An Injured Worker is considered permanently and totally disabled if the evidence shows that he is unable to engage in any sustained remunerative employment, State ex rel. Stephenson v. Indus. Comm. (1987) 31 Ohio State 3rd 167. Engaging in activities that are ongoing even if no payment is involved shows that an Injured Worker is capable of performing those same activities for pay and such activity bars the receipt of permanent total disability benefits. Sustained remunerative employment includes work that was done even on a irregular basis. State ex rel. Shultz v. Indus. Comm. (2002) 96 Ohio State 3rd 27.

In this case the Injured Worker actually engaged in sustained remunerative employment on a regular basis. Such activity demonstrates that permanent total disability benefits are not appropriate. This portion of the Staff Hearing Officer's decision is based upon the investigation report of Greater Cincinnati Investigations which contains the affidavits of various members of the Amish community. The affidavits attest to the fact that the Injured Worker drove the various

> members of the Amish community for pay. In addition, the Staff Hearing Officer relies on the Injured Worker's testimony that is contained on page 47 of the transcript of this hearing. The Injured Worker admits that he drove members of the Amish community three and sometimes four times per week. The Injured Worker stated that he charged as much as one dollar per mile for his services.
>
> The fact that the injured worker drove for hire three to four days per week is clear evidence that his activity was sustained. No evidence shows that the Injured Worker's activity was done on a sporadic basis. Because the Injured Worker was engaged in sustained remunerative employment, he is not entitled to permanent total disability benefits. Accordingly, the Staff Hearing Officer finds that permanent and total disability benefits were overpaid from1996 through 2006.

{¶20} 8. Regarding this same issue, at the September 5, 2007 hearing, the SHO noted further that relator had admitted to a pattern of activity and that, while the weekly frequency fluctuated over time, the activities continued for more than ten years. Further, the SHO noted that relator was perceived by the community as working as a driver/hauler who was available for hire. The SHO also found that relator had been overpaid DWRF benefits in all of the claims.

{¶21} 9. At the September 20, 2006 hearing on the three self-insured claims, the SHO addressed the fraud issue as follows:

> The next issue the Staff Hearing Officer must decide is whether the Injured Worker fraudulently received permanent and total disability compensation from 1996 to 2006. In order to support a finding of fraud the Staff Hearing Officer must find:
>
> 1) a representation, or where there is duty to disclosed [sic]; concealment of facts[;]
>
> 2) which is material to the transaction at hand;
>
> 3) made falsely, with knowledge of its falsity, or with such utter disregard and wrecklessness [sic] to whether it is true or

false that knowledge may be incurred;

4) with the intent of misleading another into relying upon it;

5) justifiable reliance upon the representation of concealment; and

6) resulting injury proximately caused by the reliance; State ex rel. Koonce v. Indus. Comm. (1985) 18 Ohio State 3rd 60, and Memo U.3 of the Ohio Industrial Commission's Hearing Officer's Manual.

For the reasons that follow the Staff Hearing Officer finds that the Injured Worker fraudulently received permanent total disability benefits.

The Staff Hearing Officer asked the Injured Worker if he knew that he could not both work and receive permanent and totally disability benefits. The Injured Worker [s]tated that he did know that he could not both work and receive permanent total disability benefits. * * * Despite his admitted knowledge that he could not work and receive permanent total disability, the Injured Worker failed to inform the Bureau of Workers' Compensa-tion of his employment when he completed the Bureau of Workers' Compensation's annual questionnaire which asks if he had been employed in the previous year.

Based on the foregoing facts, the Staff Hearing Officer finds that the Injured Worker concealed his employment when he had a duty to disclose it. The Staff Hearing Officer also finds that the Injured Worker's employment was material to the payment of permanent total disability compensation. The Injured Worker's failure to disclose his employment was done for the purpose of having the Bureau of Workers' Compensation rely on his lack of disclosure and pay him compensation. The Bureau of Workers' Compensation did in fact rely on the Injured Worker's failure to disclose his employment. Finally, the Bureau of Workers' Compensation suffered injury by paying the Injured Worker compensation to which he was not entitled.

Based on all the aforementioned findings the Staff Hearing Officer concludes all elements of fraud have been met. Therefore, the Staff Hearing Officer orders that the Bureau of Workers' Compensation is to recoup the overpayment declared herein pursuant to the fraud provisions of Ohio Revised Code Section 4123.511(J).

{¶22} 10. Because the issue of fraud had not been properly noticed for the September 5, 2007 hearing, a district hearing officer vacated that portion of the September 5, 2007 SHO's order addressing fraud on January 24, 2008. While the remainder of the September 5, 2007 order remained intact, the fraud issue was reset for a hearing.

{¶23} 11. On February 21, 2008, the fraud issue, as to the receipt of PTD compensation in the state fund claim, was heard before an SHO who addressed the fraud issue as follows:

> It is the order of the Staff Hearing Officer that the Bureau of Workers' Compensation has established the claimant procured permanent total disability benefits from 2/4/97 through 3/3/07 through fraud.
>
> This order is based on Industrial Commission Hearing Officer Policy Memorandum S2. Industrial Commission Policy Memorandum S2 sets forth the prima facie elements of fraud as follows:
>
> (1) A representation, or where there is a duty to disclose, a concealment of fact;
>
> (2) which is material to the transaction at hand;
>
> (3) made falsely, with the knowledge of its falsity, or with such utter disregard or recklessness as to whether it is true or false that knowledge may be inferred;
>
> (4) with the intent of misleading another into relying upon it;
>
> (5) justifiable reliance upon the representation or concealment;
>
> (6) a resulting injury proximately caused by the reliance.
>
> The Bureau of Workers' Compensation has established the prima facie elements for fraud.
>
> The claimant had a duty to disclose the material fact that he was working to the Bureau of Workers' Compensation. There

> is no evidence the claimant disclosed his working status to the Bureau of Workers' Compensation. This order is based on the 9/24/06 application for permanent total disability wherein the claimant represented that he had not worked since 1/30/91.
>
> Moreover, the claimant failed to disclose on the annual permanent total disability letters that he was working. The claimant clearly responded in the negative on these letters.
>
> Also, the claimant signed multiple warrants during this time period. The warrants contained specific language regarding the prohibition of working and collecting permanent total disability benefit checks.
>
> The Bureau of Workers' Compensation justifiably relied upon and concluded from the annual permanent total disability letters and signed warrants that the claimant was not working. The Bureau of Workers' Compensation paid permanent total disability benefits and suffered a harm based on claimant's misrepresentation.
>
> Therefore, the permanent total disability benefits received by the claimant from 2/4/97 through 3/3/07 are to be recouped pursuant to the fraud provisions of Ohio Revised Code Section 4123.511(K).
>
> All evidence was read and evaluated, however the Hearing Officer relies upon the signed warrants and the multiple annual permanent total disability letters wherein the claimant misrepresented his working status.

(Emphasis sic.)

{¶24} 12. Another hearing was held on September 23, 2008 solely to address the issue of fraud as it related to relator's receipt of DWRF benefits. The SHO concluded as follows:

> * * * Hearing Officer Manual Memo S.2 establishes a general rule that DWRF overpayments are not to be collected pursuant to ORC 4123.511(K) but rather shall be collected from future increases in such payments. However, an exception to this general overpayment collection rule is "where the Commission finds evidence of payments submitted fraudulently or resulting from misrepresentations by claimants or their representatives."

> In the case at hand, injured worker was found to have obtained PTD benefits by fraudulent means by Staff Hearing Officer orders dated 09/20/2006 and 02/21/2008. These are final orders and this Staff Hearing Officer is bound by the findings of fact and conclusions of law contained in such orders. Such findings of fact and conclusions of law contained in such orders are hereby incorporated herein by reference as if fully rewritten. As a result of these findings that injured worker was engaged in sustained remunerative employment and fraudulent receipt of PTD, PTD was terminated. Injured worker was never entitled to any PTD compensation. If injured worker was never entitled to PTD as a result of his fraudulent activities, similarly he was never entitled to any DWRF benefits as a result of these same fraudulent activities.
>
> As such, any DWRF benefits paid to injured worker commencing 02/01/2002 to date are hereby declared an overpayment. Further, such overpayment is to be collected pursuant to the fraud provision of ORC 4123.511(K) and Hearing Officer Manual Memo S.2.
>
> This order is based on the Staff Hearing Officer order, dated 09/20/2006, in claim numbers L11227-22, 869753-22, and L68211-22 which found that injured worker fraudulently received permanent total disability benefits and ordered all permanent total disability compensation benefits paid from 1996 to 2006 overpaid and to be collected pursuant to the fraud provisions of ORC 4123.511(J); the Staff Hearing Officer order, dated 09/05/2007, wherein PTD and DWRF was ordered terminated and PTD and DWRF benefits were ordered overpaid; the Staff Hearing Officer order, dated 02/21/2008 which specifically found fraud and ordered all overpaid PTD benefits to be recouped pursuant to the fraud provisions of ORC 4123.511(K); and, ORC 4123.411 et seq., which creates DWRF and entitles a disabled worker who is receiving permanent total disability and his benefits fall below a statutorily mandated minimum amount.

{¶25} 13. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶26} Relator makes two arguments: (1) the commission abused its discretion by finding that he was actually engaged in sustained remunerative employment, and (2) the

commission abused it discretion by ordering that any overpayment be collected pursuant to the fraud provision of R.C. 4123.511 because the commission did not make the necessary findings.

{¶27} The magistrate finds that the commission did not abuse its discretion when it determined: (1) that relator was engaged in sustained activity for pay, and (2) that relator committed fraud.

To recapitulate:

Self-insured claims: commission found an overpayment and fraud concerning relator's receipt of PTD compensation on September 20, 2006; an overpayment of DWRF benefits on September 5, 2007; and fraud concerning his receipt of DWRF benefits September 23, 2008.

State-fund claim: commission found an overpayment of PTD compensation and DWRF benefits September 5, 2007; fraud concerning the receipt of PTD compensation February 21, 2008; and fraud concerning his receipt of DWRF benefits September 23, 2008.

SUSTAINED REMUNERATIVE EMPLOYMENT

{¶28} Regarding the commission's finding that he was engaged in sustained remunerative employment, relator makes the same argument here which he made at the commission level. While relator admits that he received money for his activities, he argues that his activities were not performed on a consistent basis and, as such, his activities do not qualify as sustained remunerative employment.

{¶29} In *Lawson*, the Supreme Court of Ohio stated:

> PTD pivots on a single question: Is the claimant *capable* of sustained remunerative employment? * * * Payment of PTD is

> inappropriate where there is evidence of (1) actual sustained remunerative employment * * *; (2) the physical ability to do sustained remunerative employment * * *; or (3) activities so medically inconsistent with the disability evidence that they impeach the medical evidence underlying the award. * * *
>
> The first criterion is the cleanest. Nothing demonstrates capacity better than actual performance. No speculation or residual doubt is involved. * * *
>
> * * *
>
> Neither "sustained" nor "work" has been conclusively defined for workers' compensation purposes. As to the latter, clearly, labor exchanged for pay is work. * * *

Id. at ¶16-17, 19. (Emphasis sic.)

{¶30} In *Lawson*, the determination focused on the second and third reasons and not the first which is the relevant reason in the present case.

{¶31} In *State ex rel. Schultz v. Indus. Comm.*, 96 Ohio St.3d 27, 2002-Ohio-3316, the claimant, Elizabeth B. Schultz, was involved at her daughter's store, S.S. Swim Shop, while receiving PTD compensation. The evidence showed that Schultz was on the business account, paid bills, filled in on the schedule when her daughter was unable to work, consulted with merchants, placed orders, and waited on customers. Schultz admitted she was at the store three days a week, but that she did so only as a favor to her daughter. Because there was no evidence Schultz was paid for these activities, the commission's focus was on the second factor and the commission found her activities inconsistent with her receipt of PTD compensation. While Schultz argued that her activities were minimal, the commission disagreed and that finding was upheld. At ¶63, the court considered whether her activities were "sustained" and stated:

> * * * [T]he commission found, in effect, that claimant's activities were sustained, not sporadic, in nature. It rejected the notion that claimant's involvement was limited to

> ["]intermittent favors,["] finding instead that claimant engaged in * * * "an ongoing pattern of assistance"—in other words, sustained activity.

{¶32} In the present case, the commission relied on evidence that relator had been driving members of the Amish community for pay from 1996 to 2006. Further, relator admitted that he sometimes performed these activities four times per week. Also, relator indicated that he was paid for these activities and that, after paying for repairs and insurance, he made a profit. (Sept. 20, 2006 Tr. 157-63.) At a later hearing, relator indicated that he did not make a profit. This became an issue of credibility. However, regardless, the evidence demonstrates that each time relator drove a member of the Amish community or hauled goods, relator was paid for his services. Relator's activities were remunerative and the magistrate finds that the commission did not abuse its discretion in finding that his activities were sustained.

{¶33} Relator demonstrated an ongoing pattern as a driver/hauler for members of the Amish community for a period of ten years. Unlike the claimant in *Lawson* who received approximately $200 a year as a council member and who, like relator, did a significant amount of driving, every time relator got in the car to drive a member of the Amish community, he was paid for those services. Clearly, this was work in exchange for pay. Further, like the claimant in *Schultz*, relator's activities were not minimal: he regularly drove people, hauled goods and was known in the community as providing those services. See also *State ex rel. Kirby v. Indus. Comm.*, 97 Ohio St.3d 427, 2002-Ohio-6668, where the claimant's arguments that his employment was not sustained because it was not regular daily employment (because it was periodic) and his employment was not remunerative (because he was low-paid) were rejected.

FRAUD

{¶34} Further, the magistrate finds that the commission did not abuse its discretion in making a finding of fraud. The elements of fraud which must be established are: (1) a representation, or whether there is a duty to disclose, a concealment of fact; (2) which is material to the transaction at hand; (3) made falsely, with the knowledge of its falsity, or with such utter disregard or recklessness as to whether it is true or false that knowledge may be inferred; (4) with the intent of misleading another into relying upon it; (5) justifiable reliance upon the representation or concealment; and (6) a resulting injury proximately caused by the reliance. See *State ex rel. Koonce v. Indus. Comm.* (1985), 18 Ohio St.3d 60; *State ex rel. Ellis v. Indus. Comm.* (2001), 92 Ohio St.3d 508.

{¶35} In the September 20, 2006 order (self-insured claims), the SHO's findings and analysis on the issue of fraud are almost identical to the language used in the *Ellis* case wherein the Supreme Court of Ohio upheld the commission's finding of fraud. Specifically, the commission in *Ellis* stated:

> " * * * The Industrial Commission finds that the claimant was employed as a cleaning person * * * while simultaneously receiving temporary total disability compensation. The Industrial Commission finds that the claimant's employment as a cleaning person serves as a representation of a falsehood as the claimant was claiming to be unable to work over the same period of time in which he was apparently able to work. The Industrial Commission finds that the claimant's ability to perform employment activities is a material fact in the Workers' Compensation disability certification process. The Industrial Commission finds that the claimant knowingly signed at least four (4) C-84 motions requesting temporary total disability compensation with the intent of misleading those examining it to believe and rely upon the misrepresentation that he was unable to work and that the facts contained in said motions were correct and valid. The Industrial Commission finds that the Bureau of Workers' Compensation justifiably relied upon the claimant's

> representation of his inability to work as there was no evidence before it to the contrary. Finally, the Industrial Commission finds that the Bureau of Workers' Compensation suffered an injury, in the form of economic loss for compensation paid in the claim, proximately caused by the reliance on the claimant's assertion that he was unable to work during a period of time in which it was later discovered that he was employed as a cleaning person with Ohio Vending Company.["]

Id. at 511.

{¶36} In the instant case, the September 20, 2006 order specifically provides:

> The next issue the Staff Hearing Officer must decide is whether the Injured Worker fraudulently received permanent and total disability compensation from 1996 to 2006. In order to support a finding of fraud the Staff Hearing Officer must find:
>
> 1) a representation, or where there is duty to disclosed [sic]; concealment of facts[;]
>
> 2) which is material to the transaction at hand;
>
> 3) made falsely, with knowledge of its falsity, or with such utter disregard and wrecklessness [sic] to whether it is true or false that knowledge may be incurred;
>
> 4) with the intent of misleading another into relying upon it;
>
> 5) justifiable reliance upon the representation of concealment; and
>
> 6) resulting injury proximately caused by the reliance; State ex rel. Koonce v. Indus. Comm. (1985) 18 Ohio State 3rd 60, and Memo U.3 of the Ohio Industrial Commission's Hearing Officer's Manual.
>
> For the reasons that follow the Staff Hearing Officer finds that the Injured Worker fraudulently received permanent total disability benefits.
>
> The Staff Hearing Officer asked the Injured Worker if he knew that he could not both work and receive permanent and totally disability benefits. The Injured Worker [s]tated that he did know that he could not both work and receive permanent total

> disability benefits. * * * Despite his admitted knowledge that he could not work and receive permanent total disability, the Injured Worker failed to inform the Bureau of Workers' Compensation of his employment when he completed the Bureau of Workers' Compensation's annual questionnaire which asks if he had been employed in the previous year.
>
> Based on the foregoing facts, the Staff Hearing Officer finds that the Injured Worker concealed his employment when he had a duty to disclose it. The Staff Hearing Officer also finds that the Injured Worker's employment was material to the payment of permanent total disability compensation. The Injured Worker's failure to disclose his employment was done for the purpose of having the Bureau of Workers' Compensation rely on his lack of disclosure and pay him compensation. The Bureau of Workers' Compensation did in fact rely on the Injured Worker's failure to disclose his employment. Finally, the Bureau of Workers' Compensation suffered injury by paying the Injured Worker compensation to which he was not entitled.
>
> Based on all the aforementioned findings the Staff Hearing Officer concludes all elements of fraud have been met. Therefore, the Staff Hearing Officer orders that the Bureau of Workers' Compensation is to recoup the overpayment declared herein pursuant to the fraud provisions of Ohio Revised Code Section 4123.511(J).

{¶37} The magistrate also finds the following analysis from the February 21, 2008 hearing to be sufficient:

> It is the order of the Staff Hearing Officer that the Bureau of Workers' Compensation has established the claimant procured permanent total disability benefits from 2/4/97 through 3/3/07 through fraud.
>
> This order is based on Industrial Commission Hearing Officer Policy Memorandum S2. Industrial Commission Policy Memorandum S2 sets forth the prima facie elements of fraud as follows:
>
> (1) A representation, or where there is a duty to disclose, a concealment of fact;
>
> (2) which is material to the transaction at hand;

(3) made falsely, with the knowledge of its falsity, or with such utter disregard or recklessness as to whether it is true or false that knowledge may be inferred;

(4) with the intent of misleading another into relying upon it;

(5) justifiable reliance upon the representation or concealment;

(6) a resulting injury proximately caused by the reliance.

The Bureau of Workers' Compensation has established the prima facie elements for fraud.

The claimant had a duty to disclose the material fact that he was working to the Bureau of Workers' Compensation. There is no evidence the claimant disclosed his working status to the Bureau of Workers' Compensation. This order is based on the 9/24/06 application for permanent total disability wherein the claimant represented that he had not worked since 1/30/91.

Moreover, the claimant failed to disclose on the annual permanent total disability letters that he was working. The claimant clearly responded in the negative on these letters.

Also, the claimant signed multiple warrants during this time period. The warrants contained specific language regarding the prohibition of working and collecting permanent total disability benefit checks.

The Bureau of Workers' Compensation justifiably relied upon and concluded from the annual permanent total disability letters and signed warrants that the claimant was not working. The Bureau of Workers' Compensation paid permanent total disability benefits and suffered a harm based on claimant's misrepresentation.

Therefore, the permanent total disability benefits received by the claimant from 2/4/97 through 3/3/07 are to be recouped pursuant to the fraud provisions of Ohio Revised Code Section 4123.511(K).

All evidence was read and evaluated, however the Hearing Officer relies upon the signed warrants and the multiple annual permanent total disability letters wherein the claimant misrepresented his working status.

(Emphasis sic.)

{¶38} As the commission stated in its orders, relator testified that he knew that he was not permitted to work while receiving PTD compensation. Relator signed yearly statements attesting to the fact that he was not working in any capacity. Only by indicating that he was not working could relator continue to receive compensation. The BWC relied on those yearly statements and paid relator compensation accordingly. While cognizant that recoupment of this money will certainly be an economic hardship on relator, the magistrate finds that it is not this court's duty to overturn the commission's determination as to fraud because it will cause a hardship to a claimant when there is some evidence in the record to support it and the commission has provided sufficient explanation for its finding. Part of relator's argument focuses on the commission's use of his testimony to establish fraud. Relator contends that his testimony could not be used to establish any of the elements of fraud because, without it, the burden of proof was not met.

{¶39} Relator cites no law to support this contention and the magistrate cannot find any that references this as an issue. The commission is and always has been allowed to consider, evaluate and weigh testimony and other evidence and the magistrate sees no abuse of discretion here. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165.

{¶40} Relator also argues that the commission abused its discretion by relying on the testimony elicited from him at the first hearing (September 20, 2006) at subsequent hearings. Relator changed his testimony later and presented evidence which contradicted his earlier testimony. Relator contends that his later testimony would not

establish any elements of fraud and that it was an abuse of discretion for the commission to rely on his earlier testimony.

{¶41} Again, relator cites no law to support this argument and never argues that his earlier testimony was inadvertently false or that he was later misquoted. It is simply that he testified differently later.

{¶42} Having determined that the commission did not abuse its discretion when it relied on relator's testimony, it likewise was not an abuse of discretion for the commission to evaluate his later testimony and compare it to his earlier testimony. *Teece*.

{¶43} Lastly, relator argues that the commission abused its discretion by relying on evidence and testimony presented, and findings made concerning the overpayment and fraud issues relative to his receipt of PTD compensation as evidence to find an overpayment and fraud concerning his receipt of DWRF benefits.

{¶44} The magistrate disagrees and finds that the commission properly addressed this issue at the September 23, 2008 hearing:

> * * * Hearing Officer Manual Memo S.2 establishes a general rule that DWRF overpayments are not to be collected pursuant to ORC 4123.511(K) but rather shall be collected from future increases in such payments. However, an exception to this general overpayment collection rule is "where the Commission finds evidence of payments submitted fraudulently or resulting from misrepresentations by claimants or their representatives."
>
> In the case at hand, injured worker was found to have obtained PTD benefits by fraudulent means by Staff Hearing Officer orders dated 09/20/2006 and 02/21/2008. These are final orders and this Staff Hearing Officer is bound by the findings of fact and conclusions of law contained in such orders. Such findings of fact and conclusions of law contained in such orders are hereby incorporated herein by reference as if fully rewritten. As a result of these findings that injured worker was engaged in sustained remunerative employment

> and fraudulent receipt of PTD, PTD was terminated. Injured worker was never entitled to any PTD compensation. If injured worker was never entitled to PTD as a result of his fraudulent activities, similarly he was never entitled to any DWRF benefits as a result of these same fraudulent activities.
>
> As such, any DWRF benefits paid to injured worker commencing 02/01/2002 to date are hereby declared an overpayment. Further, such overpayment is to be collected pursuant to the fraud provision of ORC 4123.511(K) and Hearing Officer Manual Memo S.2.
>
> This order is based on the Staff Hearing Officer order, dated 09/20/2006, in claim numbers L11227-22, 869753-22, and L68211-22 which found that injured worker fraudulently received permanent total disability benefits and ordered all permanent total disability compensation benefits paid from 1996 to 2006 overpaid and to be collected pursuant to the fraud provisions of ORC 4123.511(J); the Staff Hearing Officer order, dated 09/05/2007, wherein PTD and DWRF was ordered terminated and PTD and DWRF benefits were ordered overpaid; the Staff Hearing Officer order, dated 02/21/2008 which specifically found fraud and ordered all overpaid PTD benefits to be recouped pursuant to the fraud provisions of ORC 4123.511(K); and, ORC 4123.411 et seq., which creates DWRF and entitles a disabled worker who is receiving permanent total disability and his benefits fall below a statutorily mandated minimum amount.

{¶45} Based on the foregoing, it is this magistrate's conclusion that relator has not demonstrated that the commission abused its discretion in finding that he was overpaid PTD compensation and DWRF benefits because he was engaged in sustained remunerative employment and ordering that those funds be recouped under the fraud provision of R.C. 4123.511(J). As such, it is this magistrate's decision that this court should deny relator's request for a writ of mandamus.

/s/ Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).